NO. 80998-4

SUPREME COURT OF THE STATE OF WASHINGTON

Allan Parmelee

Petitioner,

v.

Eric Burt, et al., and
Washington State Department of Corrections,

Co-Respondents.

DEPARTMENT OF CORRECTIONS' RESPONSE TO AMERICAN CIVIL LIBERTIES UNION (ACLU) AND WASHINGTON COALITION FOR OPEN GOVERNMENT (WCOG)

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A. Introduction

The superior court denied Mr. Parmelee's motion to intervene and relitigate this case because he knew about the case for three months and showed no excusable neglect for delaying his motion for intervention. The Department had informed Parmelee of the litigation several times. CP 499-500; CP 268. Mr. Parmelee's own writings showed he was well aware of the plaintiffs' claim. CP 230, 235 (letters dated January 12 and 14, 2005, referencing the employees claim). Further, when Mr. Parmelee moved for intervention, he claimed no prior knowledge of the case, thus providing false information to the superior court in this regard. CP 124. Judge Zagelow did not abuse his discretion by denying post-judgment intervention in such circumstances. His ruling is well supported in the record and fully consistent with a normal application of CR 24, which requires every intervention motion to be timely.

The amici Washington Coalition for Open Government (WCOG) and the American Civil Liberties Union (ACLU) do not confront the superior court's ruling. The WCOG argues instead that the requester of public records is indispensable such that it was error to proceed without Mr. Parmelee. WCOG Br. at 2-3. The ACLU disagrees with the WCOG, explaining that a requester is not indispensable. ACLU Br. at 15-18. The

ACLU argues that the requester must receive sufficient notice of the litigation to allow a motion to intervene. ACLU Br. 14.

The WCOG brief reaches the wrong conclusion when it asserts that a record requester is indispensable in a suit to enjoin examination of the records brought by persons named in records under RCW 42.56.540. That conclusion follows from the factors in CR 19(b) defining when a party is indispensable. It is possible for the court to provide a remedy under RCW 42.56.540 for persons named in records without naming the requester, and treating the requester as indispensable would leave persons named in records with no remedy when the requester is not subject to suit.

The ACLU brief correctly recognizes that a requester should have a full right to seek intervention in an action under RCW 42.56.540. The ACLU brief errs, however, when it strays from analyzing the question of sufficient notice to intervene under CR 24 and, instead, asks the Court to legislate detailed procedures that are not required by CR 24 and are at odds with RCW 42.56.540. As discussed below, there is no need to announce general procedural rules concerning notice to requesters in this case, where the issue is simply whether the superior court permissibly exercised its discretion when it denied Mr. Parmelee's inexcusably late motion to intervene.

B. The Requester Of Records Is Not Indispensible Under CR 19(b) And It Was Not Reversible Error To Proceed Without Joining Mr. Parmelee

The WCOG does not claim that the court abused its discretion in denying intervention to Mr. Parmelee under CR 24. To the WCOG, application of CR 24 is "irrelevant" to whether Parmelee should have been allowed to intervene. WCOG Br. at 2. The WCOG urges this Court to conclude that it is "absurd" for a superior court to proceed without a requester, *id.* at 2, and to conclude that the requester is "indispensable to any action for judicial review under the PRA." *Id.* at 9. The WCOG argues that there can be no controversy before a superior court if the requester is not a party, and that a PRA case is moot without a requester in the litigation. *Id.* at 2. The implication of the WCOG's argument is that the superior court lacks jurisdiction without the requester.

As implicitly conceded by the WCOG and Parmelee briefing, a case can proceed if a party is not indispensable under CR 19(b). As shown in this section, a requester is not indispensable under CR 19(b) when a third party sues under RCW 42.56.540. Regardless of whether the plaintiffs seeking to enjoin the requested release of records should have named Mr. Parmelee under CR 19(a) as a necessary party, if that is not done, the requester's rights are to intervene under CR 24. A post judgment motion to intervene is presumptively untimely. *Kreidler v.*

Eikenberry, 111 Wn.2d 828, 832, 766 P.2d 438 (1989) ("Timeliness is a critical requirement of CR 24(a).") Nothing in CR 24(a) or case law suggests that a person may intervene weeks after a civil case is concluded where the person had adequate notice of the case and failed to act. *See generally,* Suppl. Br. of Department of Corrections at 9-12. The Court should therefore reject WCOG's argument that requesters are indispensable in a case where persons named in records seek an injunction under RCW 42.56.540.

1. The Public Records Act Expressly Allows The Plaintiffs' Suit

The plaintiff-employees sued the Department under an express statutory cause of action. RCW 42.56.540 provides for a civil action by "*a person who is named in the record or to whom the record specifically pertains*":

> The examination of any specific public record may be enjoined if, *upon motion and affidavit by* an agency or its representative or *a person who is named in the record or to whom the record specifically pertains*, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

Id. (emphasis added).

As this Court held in *Soter v. Cowles Publishing Co.,* this is "plain language" allowing a civil suit. 162 Wn.2d 716, 752, 174 P. 3d 60(2007). "It is clear that either agencies *or persons named in the record* may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction." *Id.* (emphasis added).

2. A Controversy Exists When A Person With Standing Seeks An Injunction Against The Agency Holding Records Subject To A Request

WCOG argues there is no "controversy" if the requester is not named as a defendant in an action seeking to enjoin an agency from disclosing requested records. This is not correct. Implicit in the statute and in the very nature of the action it authorizes is the predicate that the agency could release the requested records unless enjoined from doing so. *E.g., Confederated Tribes of the Chehalis Indian Reservation v. Johnson,* 135 Wn.2d 734, 743, 958 P.2d 260 (1998) (persons named in record sued Gambling Commission; the requester then filed cross-complaint seeking release). If the agency conclusively decides not to release requested records, there would be little basis for an action under RCW 42.56.540.

By advocating for non-release of a record, the plaintiffs must show the superior court that an injunction should be granted and overcome the presumptions in favor of release. *Cf. Soter,* 162 Wn.2d at 750, ¶ 55. A genuine controversy thus exists when there is a request seeking records, a

possibility of release, and a person named in records seeks the relief against the agency under RCW 42.56.540. The plaintiff must satisfy the PRA standards and relevant requirements for injunctive relief.[1]

WCOG's arguments for indispensability under CR 19 are premised on the erroneous assumption that a case filed under RCW 42.56.540 precludes a non-dilatory requestor from filing suit under RCW 42.56.550. WCOG Brief at 2. The language of RCW 42.56.540 and RCW 42.56.550 contradict the WCOG's premise. RCW 42.56.540 provides that a person named in records may bring a suit to enjoin the examination of a public record. An injunction against the agency under RCW 42.56.540 would not enjoin a requester from filing suit under RCW 42.56.550. Moreover, in such a proceeding, "[t]he burden of proof shall be on the agency to establish that such refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550. Although an agency's compliance with a prior injunction could be relevant to the issues in the requester's case, it is clear that non-dilatory requesters have

[1] To obtain injunctive relief, a plaintiff must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him. *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). The plaintiff must satisfy these requirements regardless of whether the injunction is temporary or permanent. *Federal Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986).

significant tools under the PRA including intervention and including suing an agency directly.

Plaintiffs in an action for an injunction under RCW 42.56.540 may join the requester to prevent the risk of a post-injunction suit by the requester. But RCW 42.56.540 does not bar the case in the absence of such joinder. Moreover, as this case demonstrates, there is a ready mechanism for a requester to participate in an action under RCW 42.56.540 if he or she chooses to, and that is through a motion to intervene. And, as amicus ACLU points out, there is good reason not to compel joinder of requesters in every case.

Thus, the requester as a party is not a prerequisite to an action under RCW 42.56.540. Nor does the statutory cause of action depend on a subjective assessment of the adversity between the agency holding the records and the plaintiffs seeking an injunction. The controversy exists because there is a request, a pending release of the records, and because a person named in the request seeks to enjoin the release under RCW 42.56.540. That was the status of the case here when the plaintiff-employees filed suit against the Department.

3. A Suit By Persons Named In Requested Records Is Not Moot Absent The Requester As A Party

WCOG also misreads *Soter* to argue that if the requester is not named by the persons objecting to release, the case is moot. WCOG Br. at 2, citing *Soter,* 162 Wn.2d at 753, n.16. Footnote 16 in *Soter* notes that mootness results if the requester *withdraws a request* to avoid litigation when the requester has been sued. The footnote and discussion of mootness in *Soter* has no relevance to this case.

Soter does not imply that the absence of the requester as a party is to an action under RCW 42.56.540 is related to mootness. It states only that mootness results if the records have been released. The statutory cause of action by persons seeking to enjoin examination of records is not moot so long as the request is pending. Mr. Parmelee, however, did not withdraw his request and did not moot the plaintiffs' case.[2]

4. The Requester Is Not Indispensable Under CR 19(b)

The WCOG argument that the requester is an indispensable party fails because WCOG does not apply the relevant legal standards. Whether a person is necessary party or instead, is an indispensable party, is governed by CR 19(a) and (b). As explained by Professor Tegland:

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[2] WCOG also bases its mootness analysis on *Everett v. Van Dyke,* 18 Wn. App. 704, 571 P.2d 952 (1977). *Van Dyke* is inapposite because in that case the record request was fulfilled, not pending. *Van Dyke* sheds no light on whether a requester may intervene without regard to timeliness, or whether the requester is indispensable under CR 19(b).

> It is normally the prerogative of the plaintiff to determine who will be parties in a civil action. An exception to this rule is found in CR 19(a), which requires that certain persons be joined as parties if feasible. . . .
>
> Often the plaintiff, being aware of CR 19(a), will join all necessary parties. If the plaintiff does not or cannot do so, any party may move for an order requiring the joinder of a necessary party. . . .

3A Tegland, *Washington Practice* 413 (5th ed. 2006). Thus, CR 19(a) operates directly on plaintiffs and secondarily provides an option to other parties. When a person is not named by the plaintiff or other parties under CR 19(a), that person's rights are to intervene under CR 24, not to complain after trial that the plaintiff failed to name him.[3] Here, it is undisputed that Parmelee could have intervened had be been timely. However, knowing of this action for several months, he did nothing to seek participation in it.[4]

This case does not depend on whether the plaintiffs could have or should have joined Parmelee as a defendant, or whether the Department could have or should have sought Parmelee's joinder. The issue here is

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[3] The comments to the federal counterpart to CR 24 bear this out. "Intervention of rights is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication . . ." Fed. R. Civ. P. 24 (Advisory Committee Notes) (1966 Amendment); *see United Keetoowah Band of Cherokee v. United States*, 480 F.3d 1318, 1324 n.4 (Fed. Cir. 2007) (Rule 24 is a counterpart for a person to intervene if the person could have been named as a party under Rule 19(a)).

[4] In this case, there is no claim or suggestion that the proposed intervener was prejudiced by being unfamiliar with court procedures. Mr. Parmelee himself conceded when he moved for intervention that he had litigated frequently and was familiar with court processes. CP 217.

whether a requester is indispensable, such that the case should have been dismissed. Professor Tegland explains the difference between "necessary" and "indispensable" parties as follows:

> . . . Persons needed for a just adjudication are often termed *necessary parties*. If the court determines that a person is not a necessary party, the inquiry is at an end . . . .
>
> If the court concludes that a person is a necessary party, but that the person cannot be joined as a party (usually for lack of jurisdiction or for improper venue), the court must then determine under CR 19(b) whether the action can continue in the absence of the necessary party. If a party is so important to the action that the action cannot continue in the absence of that party, the party is often termed *indispensable*. . . .

3A Teglund, *Washington Practice*, 413-14 (emphasis added).

The point here is that, in light of RCW 42.56.540, a requester is not an indispensible party—*i.e.*, one in whose absence the lawsuit may not proceed. Nor does the WCOG argument show that Mr. Parmelee was indispensable. Indispensable means that in "equity and good conscience the action . . . should be dismissed, the absent person being thus regarded as indispensable." CR 19(b). Whether a person is considered indispensable depends on the factors in CR 19(b):

> The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment

> rendered in the persons absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

A requester is not indispensable in a suit brought by a person named in the records because a court can provide relief to the objecting party even in the requester's absence. For example, a judgment enjoining examination would be adequate to the plaintiffs. Thus, the third factor counsels against a conclusion of indispensability.

The most important factor here is the fourth. A conclusion that requesters are *per se* indispensable would eviscerate the statutory right of persons named in records to seek the relief provided in RCW 42.56.540 when the requester is not amenable to suit. The WCOG claims it is a "bizarre scenario" to say that a requester would be unavailable for a suit brought by persons named in records. WCOG Br. at 8. This is inaccurate. Not every requester will be amenable to a PRA suit by a person named in the records. Requesters might be in another state; requesters might secrete themselves from service of process. Indeed, if a requester could effectively bar the objector's suit under RCW 42.56.540, the requester would have an incentive to avoid service. Moreover, some requesters will inevitably be immune from suit. *See, e.g., Wright v. Colville Tribal Enterprises,* 159 Wn.2d 108, 147 P.3d 1275 (2006) (tribal business agency

had immunity from suit). Thus, on a practical level, the WCOG arguments will leave some persons named in records with no ability to vindicate the PRA exemptions under the express statutory cause.[5]

When the factors in CR 19(b) are considered, there is no merit to WCOG's argument that "taken together, these cases [*Soter, Van Dyke,* and *Hearst Corp. v. Hoppe,* 90 Wn.2d 123, 580 P.2d 246 (1978)] show the requester is an indispensable party to any action for judicial review under the PRA." WCOG Br. at 5-6. These three cases do not address the legal standards for indispensable parties. *Soter* and *Van Dyke* merely demonstrate that a case can become moot if the request is withdrawn or fulfilled before litigation. The holding in *Hearst* is that judicial review is *de novo,* which is preserved here. The plaintiffs' claim regarding an injunction faced *de novo* application of the PRA in the superior court.

Last, the WCOG argues that the Department is not an adequate advocate for a requester's interests. The Department does not suggest it acts as a representative of Mr. Parmelee's interests. Whether the Department is strongly aligned with a requester or not does not determine whether the requester is indispensable under CR 19(b). The question of indispensable turns on the other factors discussed above.

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[5] The first and second factors also counsel in favor of the conclusion that a requester is not indispensable. As discussed above, the requester has a statutory right to sue, and could bring a suit within the statute of limitations when a request is denied.

With regard to future cases, the 2007 Model Rules for the PRA point out that the best approach is for an agency to "inform the third party [seeking to enjoin release of records] that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene." WAC 44-14-04003(11) (last paragraph). In most cases, the approach in the 2007 Model Rules will serve the parties, the courts, and the public interests in PRA. Here, the Department did inform the requester in a fashion that would have allowed him to intervene, meeting the 2007 standard of informing the requester.

In summary, the WCOG is incorrect when it asserts that error exists simply because the superior court proceeded with the plaintiffs' case in the absence of the requester. The requester is not indispensable. Under the civil rules and RCW 42.56.540, when a plaintiff does not name a requester, the requester's remedy is to timely intervene under CR 24. *See* CR 24(a), (b) (requiring "timely application"). Mr. Parmelee had sufficient notice to intervene and has no excuse for delaying three months after his first notice of the litigation until the case had been concluded.[6]

[6] The amicus ACLU reaches the same conclusion on the indispensable party issue, emphasizing that "a *per se* rule that the requester is an indispensable party to any PRA injunction action would deter members of the public from exercising their right of

C. The Department Provided Meaningful Notice To The Requester Consistent With The PRA And Justifying The Court's Ruling That The Motion To Intervene Was Inexcusably Late

The Amicus ACLU recognizes that the issue before the court is whether the motion to intervene was timely, but takes no position on that issue. ACLU Br. at 2. Instead, it discusses the question of what notice might be proper in a general, abstract fashion.

For the most part, the ACLU analysis of notice is consistent with how a trial court would evaluate a requester's motion to intervene into a PRA injunction case. The ACLU suggests that the public interest in ensuring enforcement of the PRA is protected when there is "notice to the requester sufficient to allow the requester to timely intervene and advocate his or her own interests . . . ." ACLU Brief at 3. As noted in the prior briefing, the Department agrees that under CR 24 any requester should be given the opportunity to participate in a PRA case. Certainly, a court evaluating a requester's motion to intervene in a PRA case can assess whether the requester had notice of the litigation at a meaningful time and in a meaningful manner and allow intervention accordingly.

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access [to records]." ACLU Br. at 15. The ACLU also recognizes that the statute itself is silent on whether the requester as indispensable in a case brought by persons named in the records. *Id.* at 17. Both of these considerations also support the above showing that requesters are not *per se* indispensable.

The superior court denied intervention only after learning that the Department told Mr. Parmelee of the litigation affecting his request on December 22, 2004 (CP 499), and again on December 29, 2004 (CP 268). Further, the court knew that on February 1, 2005, the Department gave Mr. Parmelee specific notice of the upcoming hearing date. CP 500. The record showed that Parmelee understood that there was litigation pending—he wrote letters complaining about it. CP 230, 235. However, he took *no* steps to intervene until April 7, 2005. CP 124-195. Then, when he finally moved to intervene, he did not show that he had acted diligently in response to the above information; he instead misrepresented the facts, saying that he did not have prior notice of the case. *See* CP 124 (where he claims he "has never been given notice of this action . . . until an informal notice of the order was mailed to Parmelee that he received on March 30, 2005.") These circumstances surely support a conclusion that intervention would be untimely.

The ACLU, however, does not address CR 24. Instead, it asks the Court to legislate a notice process that the PRA does not include. The ACLU contends the PRA should be construed to require agencies to provide the requester with a copy of the Complaint, including the case number, court, parties, and alleged grounds, along with hearing dates "and information on how the requester may participate in the PRA injunction

action if he or she chooses to do so." ACLU Br. at 4; *see also* ACLU Br. at 14 (agencies have "responsibility" to provide notice that "informs the requester of the Complaint and the requester's right to participate in a PRA injunction action and the steps necessary to do so . . . .")

The ACLU offers no reason why CR 24 does not adequately address their concerns. That rule allows a requester to intervene and allows every court to examine whether the requester had adequate notice, taking into account whatever facts might be relevant in a particular motion. There is no need for the Court to adopt general rules of procedure when the issue is whether Judge Zagelow had sound reasons to reject Mr. Parmelee's post-judgment motion to intervene.

Moreover, the notices and advice that the ACLU asks for would not be material to this case. The Department informed Mr. Parmelee of the Complaint. Nor is there any colorable argument that his delay was because he did not have notice of his rights to litigate over his public records request or intervene. Thus, despite the plausible benefits from the ACLU's proposed notice requirements, it would not impeach the superior court's ruling.[7]

[7] The ACLU suggests that "[i]mportant pieces of information were omitted in the notice the Department of Corrections sent to Mr. Parmelee." ACLU Br. at 14. The ACLU does not explain what information was missing or why it would have been important. Nor did Mr. Parmelee offer any convincing argument that his lateness was

The Court should not adopt notice obligations in the abstract because the circumstances of future interveners will vary widely. A future court's evaluation of timeliness should reflect the particular circumstances, not whether the state or local agency complied with the ACLU's suggestions. Such general declarations of notice requirements would create more problems than would be solved. Agencies would be required to walk a line that comes close to advising requesters or providing legal advice regarding intervention. Moreover, if the ACLU's notice and advice proposals were engrafted onto the PRA, it raises practical questions such as whether a remedy is available if an agency violates some detail. Would a violation of the ACLU's proposals allow a requester to observe litigation for weeks and then simply intervene after the judgment?

The important principles of the PRA that the ACLU proposal would supposedly vindicate are already well-established and already well protected by the other provisions of the PRA. An agency faces penalties for failing to comply with the PRA. Requesters have significant rights to seek judicial relief. Moreover, there are appropriate legislative and quasi-legislative forums, such as the newly adopted Model Rules, where agencies can obtain guidance on general obligations of the PRA.

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caused by missing information. For example, he did not show that he was trying to get information but was delayed, nor could he have shown that in this case.

To be clear, the Department does not suggest that an agency should not cooperatively provide information in the spirit of the ALCU suggestions. The text of the PRA, however, does not justify adoption of the ALCU's proposed procedures as glosses to the statutes. CR 24 provides a ready remedy for requesters and standard by which the intervener can be evaluated as timely.

For purposes of this case, the ACLU's proposal for additional notice and advice do not demonstrate that the superior court abused its discretion under CR 24 when it denied intervention. Mr. Parmelee was not prejudiced by a lack of notice; he was dilatory.

D. Conclusion

The superior court and court of appeals rulings should be affirmed.

DATED this _____ day of January, 2009.

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CERTIFICATE OF SERVICE

I certify that I served a copy of **DEPARTMENT OF CORRECTIONS' RESPONSE TO AMERICAN CIVIL LIBERTIES UNION (ACLU) AND WASHINGTON COALITION FOR OPEN GOVERNMENT (WCOG)** on all parties or their counsel of record on the date below as follows via U.S. Mail, Postage Prepaid,

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this _____ day of January, 2009, at Olympia, Washington.

_____
KATRINA TOAL